RECORD
AND
BRIEFS

No. 15-214

In The

Supreme Court of the United States

JOSEPH P. MURR, ET AL.,

Petitioners,

v.

WISCONSIN, ET AL.,

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

BRIEF OF THE AMERICAN PLANNING ASSOCIATION AND THE WISCONSIN CHAPTER OF THE AMERICAN PLANNING ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The American Planning Association (APA) is a nonprofit public interest and research organization founded in 1909 to advance the art and science of land use, economic, and social planning at the local, regional, state, and national levels. The APA represents approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues. The APA regularly files amicus briefs in federal and state appellate courts in cases of importance to the planning profession and the public interest. Through its 47 chapters, the APA has a presence in all fifty states and the District of Columbia, including the Wisconsin Chapter of the APA.

APA members and chapters advocate excellence in planning, promoting education and citizen empowerment, and providing the tools and support necessary to meet the challenges of growth and change. Education is a central focus of the APA, and this brief provides an important opportunity to provide the Court with the context for subdivision, zoning, and other traditional forms of land use regulation at the local and state

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

levels that have formed the legal landscape of American real estate development for more than a century.

SUMMARY OF ARGUMENT

Subdivision regulations and zoning ordinances have for several decades been familiar and complementary forms of local land use regulation in urban, suburban, and even rural communities throughout the United States. The decision to subdivide a plot of land into smaller units is typically initiated by a landowner or developer, who submits the proposed land division to local planning officials for approval, as was the case in the 1950s with the property that is the focus of the instant case. The landowner or developer proposes the boundary lines for individual lots, and provisions are included in state statutes to allow those lines to be redrawn, subsequent to subdivision approval, by parcel owners, subsequent developers, or by public officials in certain instances. It is not at all unusual for purchasers to buy and build one residence on more than one lot or to re-divide an individual lot.

Because the more intense development that follows upon subdivision of residential land will have an impact on traffic, public utilities, fire protection, recreation, education, and environmentally sensitive lands, local governments often ensure that developers provide streets and other infrastructure improvements before granting final plat approval. Like all real estate development in a locality that has adopted zoning, the

subdivision of land must comply with the height, area, use, and other restrictions found in the local zoning ordinance or code, whose provisions are adopted and amended by the local legislature, as authorized by state zoning enabling legislation.

There is a long record of judicial approval of traditional zoning and subdivision regulations in the United States Supreme Court and in state and lower federal courts, despite landowner claims that local and state restrictions on land development amount to denials of equal protection, deprivations of property without due process of law, or regulatory takings. As this Court made clear in its 1926 decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), zoning and other forms of land use regulation fit comfortably within the state's police power obligation to protect public health, safety, and general welfare. The Court has consistently placed the burden on a property owner challenging the constitutionality of land use regulation to demonstrate that local or state officials have behaved in an arbitrary, capricious, unreasonable, or confiscatory manner.

Judicial approval of sensible local and state zoning, subdivision, and related land use laws makes eminent sense and is consistent with longstanding constitutional principles. This Court has long acknowledged that real property law is the traditional province of state law. Many states and localities, like Wisconsin and St. Croix County, have experimented with the use of merger provisions to maintain the crucial balance between private rights and public needs. Of course

states are free to choose other regulatory tools or to modify existing merger law provisions. Some state courts, adhering to their own state constitutional principles, have chosen to provide enhanced protection for private property owners affected by land use regulation.

Built into traditional local and state land use regulation are provisions designed to protect the vested rights of existing landowners and to ensure that restrictions on the use of land will not cause single or small groups of landowners to suffer a greater burden than their neighbors. The substandard lots provision challenged by the Petitioners, for example, is designed to allow existing landowners to develop their properties even if the physical dimensions of those properties do not comply with new provisions designed to protect the Lower St. Croix Riverway. If the Petitioners had not acquired the adjoining parcels in separate real estate transactions several years after the effective date of the merger provision, they would not have been subject to the merger provision.

Local governments, following state law and protecting property rights, allow landowners to seek variances from especially onerous zoning, subdivision, and other land use regulations. It is a central principle of land use law, however, that variance procedures are made available to property owners who, *owing to no fault of their own*, are placed in an economic straitjacket. The officials charged with deciding on variance proposals routinely reject claims based on hardships that are deemed self-created (or self-imposed). As

noted previously, the substandard lot and merger provisions were implemented several years before the Petitioners acquired title to the adjoining lots.

ARGUMENT

I. LANDOWNERS AND DEVELOPERS WHO SUBDIVIDE PARCELS OF LAND INTO SMALLER LOTS FOR SALE ARE SUBJECT TO SUBDIVISION REGULATIONS AND ZONING ORDINANCES THAT ARE COMMON IN URBAN, SUBURBAN, AND EVEN RURAL COMMUNITIES THROUGHOUT THE UNITED STATES.

A. The subdivision developer typically submits to local regulators a map showing the proposed boundary lines for individual parcels.

American landowners have been subdividing larger properties into smaller parcels for sale at least since the early nineteenth century: "Throughout the 1820s, 1830s, and 1840s, developers subdividing land in locations adjacent to the centers of New York and Boston looked for ways to promise middle-class community to potential customers." Dolores Hayden, *Building Suburbia: Green Fields and Urban Growth, 1820-2000* 42 (2003). These early subdividers, like

their modern counterparts, "never liked to sell land one plot at a time." *Id.*[2]

Today, state and local subdivision regulation is ubiquitous:

> Legislation in all states now authorizes local governments to impose a number of requirements on new subdivisions when they are platted and improved. Subdivision control ordinances require the appropriate design of lots and blocks, subdivision access, and such necessary internal improvements as internal streets and drainage, and water and sewer facilities.

Daniel R. Mandelker & Michael Allan Wolf, *Land Use Law* § 1.09 (6th ed. 2015). Moreover, "[c]ourts usually uphold the constitutionality of subdivision control requirements for subdivision design and necessary internal improvements." *Id.*

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[2] Even as public amenities became more commonplace in the late nineteenth century, the subdivision process remained owner-initiated:

> Both commercial house builders and individual families depended upon the prior work of land subdividers who cut up fields and laid out streets. The importance of this primary work cannot be overemphasized. The subdividers, by getting streets accepted as legal ways by the city of Boston, secured the modern water, gas, and sewer services so essential to small middle class developments.

Sam Bass Warner, Jr., *Streetcar Suburbs: The Process of Growth in Boston (1870-1900)* 61 (2d ed. 1978).

In 1849, Wisconsin legislators enacted statutory "provisions requiring a survey and plat for all subdivisions or additions to any town, setting out the requirements for the plat [the subdivision map], and providing a penalty for selling or leasing the lots without complying with the statutory requirements." Marygold Shire Melli, *Subdivision Control in Wisconsin*, 1953 Wis. L. Rev. 389, 405 (citing Wis. Laws 1849, c. 41). As one expert has noted, this initial legislation "reflected a strong purpose for subdivision laws that still exists today – ensuring adequate legal descriptions and proper survey monumentation of subdivided land to promote the marketability of that land." Brian W. Ohm, *Wisconsin Land Use and Planning Law* § 6.02. The current version of Wisconsin's statute regarding platting lands contains a description of the legislative purpose that is typical of state statutes:

> The purpose of this chapter is to regulate the subdivision of land to promote public health, safety and general welfare; to further the orderly layout and use of land; to prevent the overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage and other public requirements; to provide for proper ingress and egress; and to promote proper monumenting of land subdivided and conveyancing by accurate legal description. . . .

Wis. Stat. § 236.01.

According to the Petitioners' complaint, "[t]he St. Croix Subdivision plat was created in the 1950s," and "[t]he plat identifies the [Petitioners'] property as Lot E and Lot F." Joint Appendix, at 6. As expressed in Wis. Stat. § 236.11, the owner (or subdivider) may initiate the subdivision process by submitting a "preliminary plat" (defined in Wis. Stat. § 236.02(9) as "a map showing the salient features of a proposed subdivision submitted to an approving authority for purposes of preliminary consideration"). The final plat map, also subject to approval by local government officials, must include, among other information, "the boundary lines of all blocks, public grounds, streets, and alleys, and all lot lines," and "[a]ll lots and outlots in each block consecutively numbered within blocks. . . ." Wis. Stat. § 236.20(2)(c), (e).

B. Local and state laws provide opportunities for parcel lines to be redrawn after the initial subdivision plat is approved.

Lot lines contained in approved subdivisions are by no means set in stone. For example, Wis. Stat. § 236.40 provides that "[t]he owner of the subdivision or of any lot in the subdivision" is permitted "to apply to the circuit court for the county in which a subdivision is located for the vacation or alteration of all or part of a recorded plat of that subdivision." Such provisions allowing replats and resubdivisions are quite sensible and respectful of the rights of property owners, as "[s]ometimes, a community may be faced with a

plat approved and recorded decades ago but never developed or only partially developed." Brian W. Ohm, *Wisconsin Land Use and Planning Law* § 6.05. The fact situation faced by this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), involved a resubdivision, for example. *See Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 709 (R.I. 2000): "In 1936, an earlier owner had subdivided that portion of the land lying along Atlantic Avenue, leaving the remainder as an undivided lot. In 1959, SGI submitted to the town a new plat subdividing the entire property into eighty lots." *See also Arking v. Montgomery Cty. Planning Bd.*, 21 Md. App. 589, 593, 82 A.3d 1227, 1229 (2013) ("Tamara sought approval for the resubdivision of the then-undeveloped Lot 17, Block B of the Willerburn Acres Subdivision, containing 1.01 acres, into two lots of roughly equal size, known as 'Lot 60' and 'Lot 61,' in order to build two separate single-family houses."); *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 9, 43 S.W.3d 140, 146 (2001) ("[I]t is generally recognized that no restriction on subdividing lots is implied by the mere filing of a map depicting the lots."); *Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E.2d 619, 624 (1954) ("[T]he rule is that the mere sale of lots by reference to a recorded map raises no implied covenant as to size or against further subdivision.").

Lot lines can also be redrawn as a result of eminent domain, adverse possession, and, as in the instant case, merger. *See, e.g., County of Monmouth v. Kohl*, 242 N.J. Super. 210, 212, 576 A.2d 323, 324 (App. Div. 1990) ("The metes and bounds description and the sketch

showed that the strip of defendants' property which the County was taking was bounded on the north by the highway, on the east and west by their lot lines, and on the south by a line approximately 17 feet distant from and parallel to the highway right-of-way."); (*Kojis v. Rosnow*, No. 95-1005, 1995 Wisc. App. LEXIS 1451, at *1-2 (Ct. App. Nov. 21, 1995) ("The trial court redrew the boundary between Lots 2 and 3, awarding the Kojises a part of Lot 2 based on adverse possession.").

It is also not unusual for residential owners to purchase two adjoining subdivision lots and build one structure on both. *See, e.g.*, *Heath v. Parker*, 93 N.M. 680, 680, 604 P.2d 818, 818 (1980) ("Parker purchased two lots in the Deming Ranchettes subdivision in 1975 and 1977. He bought a double-wide mobile home and moved it on the lots."); *Mueller v. People's Counsel for Balt. Cty.*, 177 Md. App. 43, 59, 934 A.2d 974, 983 (2007) (the landowner "conceded that he uses his own lots as 'one parcel'; that his house 'straddles' the lot line; and his home is 'built in the center' of the two lots. Nevertheless, he explained that it is 'very common' in the neighborhood for houses to be built 'on double lots.'"). Even if taxing authorities should use two parcel numbers for assessment purposes, it would make little sense for a court to treat this residence as two parcels for purposes of constitutional takings analysis.

Indeed, while in most instances the one, specific lot in a subdivision owned that is the subject of a government regulation would be the proper focus of a takings analysis, such is not always the case. The impermanence of lot lines is a feature of real estate law

generally and subdivision law specifically. To base takings analysis *necessarily* on a unit of property ownership that is subject to change, often at the instigation of the landowners themselves, is problematic.

C. Subdivision proposals, which are typically submitted for approval to non-elected administrators or boards, must comply with zoning ordinances that are adopted and amended by the local government's legislative body.

The subdivision of larger parcels of land into smaller lots for resale is an activity that, as noted above, is subject to state and local regulation. In almost all American urban and suburban communities, zoning is a parallel, complementary form of police power regulation governing the use of real property. Subdivision proposals, like all real estate development projects, must comply with the use, height, setback, and other requirements of the zoning ordinance. As the Supreme Court of Connecticut has noted,

> We also have recognized that, although the zoning and planning functions are distinct, they are not entirely unrelated. For example, zoning commissions are authorized under [Conn. Gen. Stat. Ann.] § 8-2 to regulate lot size and shape; and General Statutes § 8-2611 expressly forbids a zoning commission from approving any subdivision application that conflicts with such regulations.

Lord Family of Windsor, LLC v. Planning & Zoning Comm'n, 288 Conn. 730, 736-37, 954 A.2d 831, 835-36 (2008) (citations omitted).

Several authorities discuss the relationship between subdivision and zoning regulations. The Maryland Court of Appeal, for example, has explained:

> It is well-settled that zoning regulations and subdivision controls regulate different aspects of the land use regulatory continuum. While zoning laws define the uses that are permitted in a particular zoning district, . . . subdivision regulations inform how, when, and under what circumstances a particular tract may be developed. Included in these subdivision controls are provisions which require the developer/property owner to construct infrastructure improvements of various types necessary to support "uses" permitted in the zone by the applicable zoning regulations.

People's Counsel for Balt. Cty. v. Surina, 400 Md. 662, 688-89, 929 A.2d 899, 914-15 (2007) (citations omitted).

These two ubiquitous forms of land use regulation differ structurally as well:

> The most important legal difference between zoning and subdivision is in the administration of the two regulatory programs. The change of zoning necessary for many new developments is typically an act of the local legislative body, involving an amendment to a map that is adopted as part of a local ordinance or law. In contrast, the regulation of

> subdivisions is entirely administrative and involves comparing the proposed subdivision to standards set forth in adopted regulations.

Powell on Real Property § 79D.03[2] (Michael Allan Wolf gen. ed. 2016). The power to review and approve subdivision plats often resides in the local planning board or commission, or it may be retained by the local legislative body. *See, e.g.*, Arden H. Rathkopf *et al.*, *Rathkopf's The Law of Zoning and Planning* § 89:18 (2016); Patricia E. Salkin, *American Law of Zoning* § 31:9 (2016).

II. TRADITIONAL ZONING AND SUBDIVISION REGULATIONS HAVE A LONG TRACK RECORD OF ACCEPTANCE BY FEDERAL AND STATE COURTS, DESPITE EQUAL PROTECTION, DUE PROCESS, AND TAKINGS CLAIMS.

A. Local land use regulation is widely understood to be within the police power obligations of the state to protect public health, safety, and general welfare.

The local subdivision, zoning, and riverway protection regulations involved in the instant case reside comfortably within the state's duly designated police power authority and responsibility to protect the public health, safety, and general welfare. As Chief Justice Roberts wrote for the majority in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007), "States and municipalities are not

private businesses – far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens."

The purpose of Wisconsin's statute authorizing localities to regulate subdivisions, for example,

> is to promote the public health, safety and general welfare of the community and the regulations authorized to be made are designed to lessen congestion in the streets and highways; to further the orderly layout and use of land; to secure safety from fire, panic and other dangers; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements; to facilitate the further resubdivision of larger tracts into smaller parcels of land. . . .

Wis. Stat. § 236.45. Similar language can be found in the zoning enabling statute – Wis. Stat. § 59.69 ("to promote the public health, safety, convenience and general welfare") – and in the statute preserving the Lower St. Croix River – Wis. Stat. § 30.27 ("The preservation of this unique scenic and recreational asset is in the public interest and will benefit the health and welfare of the citizens of Wisconsin.").

The purpose of Wisconsin's "Standards for the Lower St. Croix National Scenic Riverway" (Wis. Admin. Code NR 118.01-.09) is undeniably consistent with the goals of the state's police power and with the wishes of Congress:

> The following rules are necessary to reduce the adverse effects of overcrowding and poorly planned shoreline and bluff area development, to prevent pollution and contamination of surface waters and groundwaters and soil erosion, to provide sufficient space on lots for sanitary facilities, to minimize flood damage, to maintain property values, and to preserve and maintain the exceptional scenic, cultural and natural characteristics of the water and related land of the Lower St. Croix riverway in a manner consistent with the national wild and scenic rivers act (P.L. 90-542), the federal Lower St. Croix river act of 1972 (P.L. 92-560) and the Wisconsin Lower St. Croix river act (s. 30.27, Stats.).

Id. at NR 118.01.

Judicial recognition of the essential relationship between land use regulation and the police power is widespread. *See, e.g.*, *Munroe v. Town of E. Greenwich*, 733 A.2d 703, 710 (R.I. 1999) ("Zoning, land development and subdivision regulations constitute a valid exercise of police power. . . ."); *In re Estate of Sayewich*, 120 N.H. 237, 240, 413 A.2d 581, 583 (1980) (citations omitted) ("Subdivision regulations are not a means of controlling the alienability of land, but of promoting the orderly and planned growth of a municipality. To

the extent that it promotes the health, safety, morals and general welfare of the community, the imposition of subdivision regulations is a proper exercise of the police power."); *State ex rel. Anaya v. Select W. Lands, Inc.*, 94 N.M. 555, 558, 613 P.2d 425, 428 (Ct. App. 1979) ("It is widely established that enactment of subdivision laws is a proper exercise of the legislature's police power for safeguarding the interest of the public against fraud, financial loss, and injury to public health and safety."); *Wood v. City of Madison*, 260 Wis. 2d 71, 121, 659 N.W.2d 31, 56 (2003) ("Zoning, like subdivision regulation, is an exercise of the police power.").

B. Property owners bear the significant burden of showing that local subdivision regulations and zoning ordinances are arbitrary, capricious, unreasonable, or confiscatory.

For ninety years, this Court has recognized the fundamental constitutionality of zoning and other forms of land use regulation, even when property owners claim that their rights under the Due Process, Equal Protection, or Takings Clauses have been violated. The pattern of deference to local land use regulators was firmly established in the Court's ruling in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which Justice Sutherland, writing for the majority, explained that, "before the [village's zoning] ordinance can be declared unconstitutional," the Court must say "that such provisions are clearly arbitrary and unreasonable, having no substantial relation to

the public health, safety, morals, or general welfare." *Id.* at 395. Moreover, the Court provided guidance for lower federal and state court judges in zoning cases when Justice Sutherland wrote: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. *See generally*, Michael Allan Wolf, *The Zoning of America:* Euclid v. Ambler (2008).

While *Euclid v. Ambler* and its progeny were cases involving due process and equal protection challenges, federal and state courts have also upheld traditional zoning practices when landowners have alleged that confiscatory regulatory takings have occurred. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land. . . .");[3] *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("citation omitted") ("Indulging in the usual presumption of constitutionality, we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation."); *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135, 138 (2d Cir. 1984) ("[T]he inability of appellants to receive a reasonable

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[3] While the *Agins* Court offered a second way in which a general zoning ordinance could effect a taking – "if the ordinance does not substantially advance legitimate state interests," 447 U.S., at 260, a unanimous Court later clarified "that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

return on their investment by itself does not, as a matter of law, amount to an unconstitutional taking. . . ."); *Huard v. Town of Pelham*, 159 N.H. 567, 574, 986 A.2d 460, 466 (2009); ("These assertions fail to support a claim that the ZBA's [Zoning Board of Appeal's] application of the zoning ordinance substantially denied him the economically viable use of his land."); *Central Motors Corp. v. City of Pepper Pike*, 73 Ohio St. 3d 581, 587, 653 N.E.2d 639, 644 (1995) ("A zoning ordinance denies a property owner an economically viable use if it denies an owner all uses except those which are highly unlikely or practically impossible under the circumstances.").

III. REAL PROPERTY LAW, INCLUDING LAND USE REGULATION, HAS LONG BEEN RECOGNIZED TO BE WITHIN THE TRADITIONAL PROVINCE OF STATE LAW.

A. Like Wisconsin and St. Croix County, many states and localities throughout the nation use merger provisions for lots that do not meet the physical dimensions required by land use regulations.

This Court has long viewed real property law as the special province of state law. For example, Justice Scalia, in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2597 (2010), observed that, "[g]enerally speaking, state law defines property interests." Cited for this proposition was Chief Justice Rehnquist's majority opinion in *Phillips*

v. Wash. Legal Found., 524 U.S. 156, 164 (1998) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)): "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *See also Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law.").

What is true of the common law of real property is equally true of state and local regulation of land use. Justice Thomas has referred to zoning as "the quintessentially local activity." *Evans v. United States*, 504 U.S. 255, 295 (1992) (Thomas, J., dissenting). Justice Marshall, although dissenting from the majority's refusal to find a specific zoning provision invalid, stated:

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that deference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms. . . .

> Our role is not and should not be to sit as a zoning board of appeals.

Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). *See also Warth v. Seldin*, 422 U.S. 490, 508 (1975) ("[Z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities."). The notion expressed by Justice Marshall, particularly in the last quoted sentence, has been shared for several decades by state and federal appellate judges who do not view it as their role to second-guess local land use regulators. *See, e.g.*, *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985) ("[T]his court has repeatedly said that federal courts do not sit as a super zoning board or a zoning board of appeals."); *Constr. Indus. Ass'n of Sonoma Cty. v. Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975) ("Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation."); *Peachtree Dev. Co. v. Paul*, 67 Ohio St. 2d 345, 354, 423 N.E.2d 1087, 1094 (1981) ("[W]e do not sit as a super board of zoning appeals."); *Brae Burn, Inc. v. City of Bloomfield Hills*, 350 Mich. 425, 430, 86 N.W.2d 166, 169 (1957) ("[T]his Court does not sit as a super-zoning commission.").

For more than a century, American states and municipalities, as part of the great federalist experiment, have developed variations on the initial patterns of planning and zoning as responses to, using Justice

Scalia's memorable phrase, "changed circumstances or new knowledge." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992). The merger provision found in the St. Croix County Code of Ordinances § 17.36, part of the state and county effort to protect the Scenic Riverway, is the product of the state and local legal laboratory. Several legislatures have enacted merger provisions in state land use law, and dozens of municipalities throughout the country, in accordance with state authorization or on their own, have promulgated similar exceptions from "grandfather" clauses that permit use of lots otherwise deemed undevelopable.

Minnesota's statutory protections for the same Lower Saint Croix Nation Scenic Riverway feature provisions on nonconforming lots, including multiple lots held by a common owner. In order to develop an individual lot held under common ownership, the following conditions, reflective of the sensitivity of shoreland parcels, must be met:

> (1) the lot must be at least 66 percent of the dimensional standard for lot width and lot size for the shoreland classification . . . ;
>
> (2) the lot must be connected to a public sewer, if available, or must be suitable for the installation of a Type 1 sewage treatment system . . . ;
>
> (3) impervious surface coverage must not exceed 25 percent of each lot; and
>
> (4) development of the lot must be consistent with an adopted comprehensive plan.

Minn. Stat. § 394.36(5)(c). The following merger provision applies if the requirements listed above cannot be met: "A lot . . . not meeting the requirements . . . must be combined with the one or more contiguous lots so they equal one or more conforming lots as much as possible." Minn. Stat. § 394.36(5)(d).

Mass. Gen. Laws ch. 40A, § 6 similarly carves out an exception for commonly owned property:

> Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage. . . .

Some state legislatures have enacted statutes authorizing local governments to enact merger provisions. Rhode Island's law, for example, allows the merger option, subject to certain standards that will ensure rational land development: "Provisions may be made for the merger of contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership to create dimensionally conforming lots or to reduce the extent of dimensional nonconformance." R.I. Gen. Laws § 45-24-38. Localities in New Mexico and California are also allowed the option

of incorporating merger provisions in their zoning ordinances. *See* N.M. Stat. Ann. § 47-6-9.1(B) ("Nothing in this section limits a board of county commissioners, pursuant to notice and public hearing, from requiring consolidation of contiguous parcels in common ownership for the purpose of enforcing minimum zoning or subdivision standards on the parcels.").

The California statute authorizes local governments to employ merger under specified conditions. A review of those conditions reveals some of the reasons why the development of substandard lots is antithetical to sound planning practices. Merger will be allowed only if,

> With respect to any affected parcel, one or more of the following conditions exists:
>
> (1) Comprises less than 5,000 square feet in area at the time of the determination of merger.
>
> (2) Was not created in compliance with applicable laws and ordinances in effect at the time of its creation.
>
> (3) Does not meet current standards for sewage disposal and domestic water supply.
>
> (4) Does not meet slope stability standards.
>
> (5) Has no legal access which is adequate for vehicular and safety equipment access and maneuverability.

> (6) Its development would create health or safety hazards.
>
> (7) Is inconsistent with the applicable general plan and any applicable specific plan, other than minimum lot size or density standards.

Cal. Gov. Code § 66451.11(b).

Like St. Croix County, local governments in the states cited in the paragraphs above, and in other states throughout the country, have adopted a range of merger provisions. By sampling language from a few ordinances, the reader can get an idea of the popularity and similarity of the merger language employed by local lawmakers. Old Orchard Beach, Me., Code § 78-145(b) provides:

> If two or more contiguous lots are owned by the same person and if any of the lots do not meet the requirements for lot frontage or lot areas established by this chapter, the lots shall be merged to the extent necessary to create a lot which complies with the lot frontage and lot area requirements of this chapter, and no portion of the lots so merged which does not meet the lot area and lot frontage requirements of this chapter may be built upon or may be sold if such sale would result in separate ownership of the nonconforming portion.

Huntsville, Ala., Code § 74.1.2 provides:

> Where two or more contiguous lots under common ownership are sufficient to create one lot of dimensions conforming to the requirements

> for the district in which the lots are located but the lots are not sufficient for the creation of two or more fully conforming lots, then all of the said lots shall be deemed merged into one lot.

Lafayette, Colo., Code § 26-26-5(b) provides:

> If two (2) or more adjacent, unimproved, nonconforming lots with continuous frontage are held in identical ownership at any time after the effective date of this chapter, the lands shall be considered to be an undivided lot or parcel and no portion of such lands shall be sold or used in a manner that diminishes compliance with the lot width and area requirements established by this chapter.

The idea of merging multiple substandard or otherwise nonconforming parcels and treating them as one is not unusual, unprecedented, or unwise. The burden should be on parties such as the Petitioners who are challenging merger provisions to overcome the longstanding deference that this Court has afforded local land use regulators exercising traditional zoning, planning, and subdivision functions.

B. State legislatures are free to adopt, reject, or modify merger provisions.

While many states and localities have adopted merger provisions, lawmakers in most states are free to craft those measures to meet local circumstances or to choose not to rely on the merger tool. The experience

in Vermont is instructive, for in 2003 the state legislature amended a mandatory merger provision with a permissive one ("The [municipal] bylaw *may provide* that if an existing small lot subsequently comes under common ownership with one or more contiguous lots, the nonconforming lot shall be deemed merged with the contiguous lot." 24 Vt. Stat. Ann. § 4412(2)(B) (emphasis added).

C. State judges interpreting their own state constitutions can choose (and have chosen) to provide enhanced protection for real property owners.

This Court has shown itself to be a strong bulwark for the protection of private property rights. Nevertheless, state high courts, relying on provisions from their own state constitutions, are free to augment the ample protections that the U.S. Constitution affords private property owners. For example, in *PA Nw. Distribs. v. Zoning Hearing Bd.*, 526 Pa. 186, 584 A.2d 1372 (1991), the Supreme Court of Pennsylvania – interpreting Pa. Const. art. I, §§ 1 (identifying the right "of acquiring, possessing and protecting property" among "certain inherent and indefeasible rights") and 10 (the state takings clause) – ruled, contrary to the prevailing rule in other jurisdictions, that the use of amortization to eliminate nonconforming uses was invalid. The Supreme Court of New Hampshire has questioned the generous deference afforded local officials exercising their zoning power, ruling, "As the right to use and enjoy property is an important substantive right, we use

our intermediate scrutiny test to review equal protection challenges to zoning ordinances that infringe upon this right." *Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 758, 917 A.2d 707, 717 (2007).

IV. STATE AND LOCAL LAND USE REGULATIONS PROVIDE MANY MECHANISMS FOR PROTECTING VESTED PRIVATE PROPERTY RIGHTS.

A. Local zoning ordinances feature a wide variety of measures designed to allow landowners to continue the operation of uses and the use of buildings that have become nonconforming owing to new regulations.

When zoning and other land use regulations are implemented for the first time in a municipality, or when regulations further restrict allowable uses of land or the dimensions of the property upon which development can take place, the vested rights of landowners already making use of the land are protected by statutes, ordinances, and court rulings. These vested rights protections are common, despite this Court's argument in *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (citation omitted), that police power regulations can be retroactive: "A vested interest cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." "The courts now hold that a municipality may not zone retroactively to terminate a nonconforming

use, and some state zoning statutes impose this limitation." Daniel R. Mandelker & Michael Allan Wolf, *Land Use Law* § 5.74 (2015). *See, e.g.*, *Jones v. City of Los Angeles*, 211 Cal. 304, 321, 295 P. 14, 22 (1930) ("[W]here, as here, a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of police power."); Ky. Rev. Stat. Ann. § 100.253(1) ("The lawful use of a building or premises, existing at the time of the adoption of any zoning regulations affecting it, may be continued, although such use does not conform to the provisions of such regulations, except as otherwise provided herein.").

B. The substandard lots provision in this case was enacted to maintain the development rights of existing landowners while providing protection for the Lower St. Croix Riverway.

The general intent and effect of St. Croix County, Wis., Code of Ordinances Land Use & Dev., Subch. III.V, Lower St. Croix Riverway Overlay Dist. § 17.36I.4, the provision challenged in the instant case, are to protect the development rights of owners affected by Wisconsin's "Standards for the Lower St. Croix National Scenic Riverway," Wis. Adm. Code NR 118.01-.09. The language of § 17.36I.4 – that which permits substandard lots to be used as building sites under certain circumstances (the "grandfather" provision) and that which provides special conditions for the

sale and development of adjacent, substandard lots held by a common owner as in the instant case – is identical to the language found in Wis. Admin. Code NR 118.08(4), the provision governing substandard lots.

C. The Petitioners were subject to the merger provision because they acquired title to the two adjacent, substandard lots more than 18 years after the effective date of the change in land use regulations that public officials adopted to protect the Riverway.

According to the Court of Appeals of Wisconsin, Lots E and F were under separate ownership when the new regulations went into effect in 1976. According to the court, it was not until 1995, after the Murrs' parents transferred the lots to all of the Murr children that the adjoining, then-substandard lots were held in common ownership and thus subject *for the first time* to the state and county restrictions. *See Murr v. St. Croix Cty. Bd. of Adjustment*, 332 Wis. 2d 172, 177-78, 796 N.W.2d 837, 841 (Ct. App. 2011). Even after the merger provision went into effect, the Murrs' parents would have been able to take advantage of the "grandfather" provision, an option that was not available to the Petitioners who, through separate conveyances, acquired ownership of adjoining parcels after the duly promulgated regulations went into effect.

Built into traditional local and state land use regulation are provisions designed to protect the vested

rights of existing landowners and to ensure that restrictions on the use of land will not cause single or small groups of landowners to suffer a greater burden than their neighbors. The substandard lots provision challenged by the Petitioners, for example, is designed to allow existing landowners to develop their properties even if the physical dimensions of those properties do not comply with new provisions designed to protect the Lower St. Croix Riverway. If the Petitioners had not acquired the adjoining parcels in separate real estate transactions after the effective date of the merger provision, they would have been able to develop both separately owned, though adjacent, substandard lots.

V. PROPERTY OWNERS WHO ARE PARTICULARLY BURDENED CAN SEEK VARIANCES FROM GENERAL ZONING, SUBDIVISION, AND OTHER LAND USE REGULATIONS THAT WOULD CAUSE HARDSHIPS NOT SHARED BY ALL OWNERS.

A. Landowners who, because of special circumstances, are unfairly burdened by general zoning, subdivision, and other land use provisions, are allowed to seek variances permitting development that otherwise would be prohibited.

Property owners whose development plans are frustrated by zoning and subdivision requirements often seek relief from the local board of adjustment (or board of zoning appeals), an administrative body that

is authorized to grant or deny variances. Wisconsin's statute, which authorizes local boards of adjustment to consider variance applications, is typical:

> The board of adjustment shall have [the power]: . . .
>
> (c) To authorize upon appeal in specific cases variances from the terms of the ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done. . . .

Wis. Stat. § 59.694(7).

Similar to the protections afforded owners of nonconforming uses and the Respondents' "grandfather" provision for substandard lots, the variance is a device designed to make sure that property owners are not especially burdened by land use regulations. One authority observes that "[t]he granting of a variance has been called an 'escape valve' that is available when strict application of a zoning ordinance would result in an unnecessary burden on the landowner. A variance protects the landowner's rights from the unconstitutional application of zoning laws." Daniel R. Mandelker & Michael Allan Wolf, *Land Use Law* § 6.38 (2015) (footnote omitted). While "[t]he variance was developed early in the history of zoning out of a recognition that exceptions should be available from the strict application of zoning laws when necessary to correct maladjustments and to prevent inequitable or confiscatory

effects," according to a leading commentator, "the remedy provided by a variance is an extraordinary one that should be limited to those cases where unusual or exceptional circumstances exist to justify the deviation from otherwise applicable zoning laws." Patricia E. Salkin, *American Law of Zoning* § 13:1 (2016).

The Petitioners unsuccessfully sought six variances from the county board of adjustment, and that body's denials were upheld by the Court of Appeals of Wisconsin in *Murr v. St. Croix County Bd. of Adjustment*, 332 Wis. 2d 172, 178, 796 N.W.2d 837, 841 (Wis. Ct. App. 2011). Key to the instant case was the board's denial of the Petitioners' variance from the merger provision ("variance to sell or use two contiguous substandard lots in common ownership as separate building sites"). *Id.* The state appellate court rejected the Petitioners' argument "that any existing substandard lot that was not under common ownership on January 1, 1976, remains forever exempt under the ordinance, regardless of whether it subsequently comes under common ownership with an abutting lot." *Murr*, 332 Wis. 2d at 181, 796 N.W. 2d at 843.

Rather than pursuing several other avenues for developing their property, *see* Brief in Opposition to Petition for Writ of Certiorari, *Murr v. Wisconsin*, No. 15-214, at 13-14 (Oct. 16, 2015), the Petitioners instead returned to court, and the result was another negative ruling by the Court of Appeals of Wisconsin, *Murr v. State*, 359 Wis. 2d 675, 859 N.W.2d 628 (Wis. Ct. App. 2014).

B. State law generally provides that, in the event that the hardship faced by the landowner is self-created or self-imposed, a variance will not be available.

It is not unusual to find in variance cases the notion that "hardships that are self-created will not support the grant of a variance." Patricia E. Salkin, *American Law of Zoning* § 13:16 (2016). Relying on precedent from the Supreme Court of Wisconsin, the state appellate court ruled that,

> because Murr is charged with knowledge of the existing zoning laws, as a subsequent owner she was already in a better position than any person who owned at the provisions' effective date. Unless she or a subsequent owner brought her vacant lot under common ownership with an adjacent lot, that parcel would forever remain a distinct saleable, developable site. Unlike those who owned on the effective date, she had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot.

Murr, 332 Wis. 2d at 184-85, 796 N.W. 2d at 844 (citing *State* ex rel. *Markdale Corp. v. Board of Appeals of Milwaukee*, 27 Wis. 2d 154, 162, 133 N.W.2d 795 (1965)). While the Petitioners' knowledge of the merger provision would not *necessarily* bar a variance application (or a takings claim[4]), it is a factor that works against

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[4] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001) ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."). *See also*

any hardship assertion. *See, e.g.*, Patricia E. Salkin, *American Law of Zoning* § 13:16 (2016) ("In most jurisdictions, . . . purchase with knowledge is not a per se bar to obtaining a variance. It nevertheless remains relevant to the decision of whether to grant a variance.").

CONCLUSION

The zoning, subdivision, and other land use regulations promulgated by the state of Wisconsin and St. Croix County fit comfortably within the ambit of the police power. For nearly a century, this Court has accorded generous deference to state and local land use regulators who act to protect public health, safety, and general welfare, while respecting the private property rights of landowners. The state and county in the instant case have maintained the important balance between public need and private right. The familiar merger provision challenged in this case logically, practically, and legally treats as one parcel the two commonly owned subdivision lots that the Petitioners acquired after the effective date of the relevant regulation; and the county board of adjustment's consideration of Petitioners' variance application was in line with established principles of land use law.

Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (identifying "reasonable investment backed expectations" as important factor in regulatory takings analysis).

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